(19)

No. 04-10566

In The
Supreme Court of the United States

MOISES SANCHEZ-LLAMAS

Petitioner

vs.

STATE OF OREGON

Respondent

On Writ of Certiorari
To The Supreme Court of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States?

2. Does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to police?

3. Do police violate an intoxicated foreign detainee's rights under the Fifth and Fourteenth Amendments to the United States Constitution when they obtain custodial statements from that detainee after he has been beaten, continually questioned for 11 hours and not informed of his rights to consular notification and access?

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OPINIONS AND ORDERS BELOW

The Circuit Court for the State of Oregon entered an unpublished criminal judgment against petitioner. The Oregon Court of Appeals affirmed petitioner's conviction without opinion. That decision is reported at *State v. Sanchez-Llamas*, 191 Or. App. 399, 84 P.3d. 1133 (2004) (App 12). The Oregon Supreme Court order allowing review is reported at *State v. Sanchez-Llamas*, 337 Or. 34, 93 P. 3d. 71 (2004) (App 13). The Supreme Court opinion affirming petitioner's convictions is reported at *State v. Sanchez-Llamas*, 338 Or. 267, 108 P. 3d. 573 (2005) (App 14-23). The Oregon Supreme Court subsequently ordered the final appellate judgment to be held in abeyance pending United States Supreme Court action on this petition for writ of certiorari. That order was not reported and is attached at App 24.

STATEMENT OF JURISDICTION

The Oregon Supreme Court issued its decision is this case on March 10, 2005. This court has jurisdiction pursuant to Article III, Section 2, of the United States Constitution, and 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI of the United States Constitution provides in pertinent part:

> "This Constitution and the Laws of the United Sates * * *; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be * * * compelled in any criminal case to be a witness against himself * * *."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

"* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *"

Article 36 of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 100-01 (hereinafter "Vienna Convention"), provides:

"(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

"(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

"(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

"(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

"(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

The Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, 21 U.S.T. 326, T.I.A.S. No. 6820 provides:

> "Disputes arising out of the interpretation or application of the Convention shall be within the compulsory jurisdiction of the International Court of Justice."

STATEMENT OF THE CASE

Facts from Pretrial Motion to Suppress Statements

Defendant was charged with numerous counts, including two counts of attempted aggravated murder due to the fact that the victims were police officers. Prior to trial, petitioner moved to suppress his statements to police on two grounds. First, petitioner argued that his statements were made unknowingly and involuntarily in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution as well as the Oregon Constitution. Second, petitioner argued that his statements were obtained in violation of the Vienna Convention, thereby violating his right to Due Process. A copy of petitioner's motion is attached at App 1-9. The following facts summarize the hearing on that motion.

Petitioner speaks little English. (Tr 76, 108, 136) Shortly after 3:00 a.m., on December 18, 1999, petitioner shot at two police officers and wounded one of them. (Tr 16-27, 36-46, 52-67) After the shooting, Misty Senter saw petitioner run along the back of a row of duplexes in a confused manner, like he was "going around in circles." (Tr 88) Out of sight of police officers, petitioner put the two handguns he was carrying on the ground. (Tr 29, 46, 50-51, 67-68, 70, 88-90) Police officers located petitioner and told him in English to show his hands and to come out from behind the building. (Tr 27-28, 30, 46-47, 68, 88, 90, 94, 104-105) There were at least 10 officers present at the time of the arrest. (Tr 33)

After first showing the officer his hands, one at a time, petitioner came out with his hands up, stopped and turned around as instructed, but did not go down on his knees as instructed. (Tr 47, 69-71, 90, 111-13) One officer, fearing that petitioner still had a gun, tackled petitioner, knocking him face-down to the ground. (Tr 47-48, 71, 106) Three other officers joined in to subdue and handcuff petitioner who was struggling. (Tr 34, 48, 71, 96-96, 106-07) The arresting officers administered punches and "focus blows" with a flashlight to his face, back and arms to effect the arrest. (Tr 49, 91, 106)

At 3:48 a.m., petitioner was examined by a paramedic at the police department. (Tr 75) She asked him in English if he was in pain, if he wanted to go to the hospital and if he wanted her to treat him. (Tr 76-77) Petitioner just shook his head and said, "No." (Tr 77) He told her, "Bang, Bang," and mimed being hit on the head and chest. (Tr 81-82) Although she could only communicate with petitioner in a limited way, the paramedic concluded that petitioner was alert, oriented to person, place, time and events and "capable of understanding and making appropriate decisions." (Tr 79-81)

Police detective William Ford began interrogating petitioner at 4:36 a.m. (Tr 123) "Community Service Officer" Arturo Vega acted as interpreter. (Tr 118, 175) Those two officers, a third officer and petitioner sat in a room measuring 11 feet by 10 feet. (Tr 118-20, 122-23; Exh. No. 7) Ford testified that petitioner appeared "heavily intoxicated" but also appeared "coherent" and able to communicate "effectively." It did not appear as if petitioner could not understand what was going on. (Tr 124-25, 176)

Petitioner was advised of his *Miranda* rights in Spanish and English. (Tr 122) Petitioner indicated that he understood his rights. (Tr 123) In pertinent part, petitioner told the police that he was walking to his brother's house when he first saw the police across the street. (Tr 147) He

admitted that he had a black .357 magnum revolver. (Tr 148) He saw the police running behind the duplexes. (Tr 150) As he was crossing the street, he heard someone shooting, but did not think the police were shooting at him. (Tr 150) After he saw the police and heard the shots, he got scared and got rid of the gun. (Tr 125, 150, 205) He heard the police tell him to raise his hands. (Tr 151) He did not resist the police. (Tr 151) Petitioner denied firing the gun. (Tr 126, 148, 151) He denied possessing a second gun. (Tr 149)

At 5:55 a.m., the officers took a ten-minute break. (Tr 126) Oregon State Police detective Barthel joined Ford and Vega. They resumed the interview and brought a tape-recorder. (Tr 126-27) Petitioner began complaining of being dizzy and in pain, and he wanted to lie down on the floor. (Tr 128-29) At 7:00 a.m., they took him to the hospital. (Tr 129)

At the hospital, at 7:15 a.m., petitioner was examined by a nurse and a doctor. (Tr 129, 163) Nurse Beatrice Martinez is fluent in Spanish. (Tr 161) She testified that petitioner was "slurry", lethargic and not "fully alert." (Tr 162-65) She felt that he was "sort of just coming off the alcohol, so to speak, sort of like a morning hangover type when you're sort of lethargic and not totally with it, but not out of it." (Tr 165)

At 7:33 a.m., while petitioner while was lying on a bed waiting to be x-rayed, Ford, Vega and Barthel resumed their interrogation. (Tr 129-30) Petitioner was re-advised of his *Miranda* rights in Spanish and English. (Tr 129) He said that he understood them and was feeling better. (Tr 129-30) Police continued the interrogation with a few short breaks for medical attention. Petitioner continued to deny shooting at police. (Tr 130-34)

At 9:00 a.m., petitioner was taken back to the police station. (Tr 134) The officers resumed their interrogation at 9:45 a.m. in an office measuring 10 feet by 10 feet. (Tr 120, 135; Exh. No. 8) The three officers, Ford, Vega and Barthel, were joined by a fourth officer, Teresi.

(Tr 135) Barthel, through Vega, told petitioner that he must be honest with the officers "because you are not going to have many chances to tell us." (Tr 135, 152; Exh. No. 1, p 1) Vega told petitioner that he "is going to go a lot further being honest with [the police] than lying to [the police]" and that the "police are going to find out anyway, so it's better that you talk now. Better than * * * later, they go after you more, ok?" (Tr 179-80; Exh. No 1, p 6)

In this phase of the interrogation,[1] petitioner said that "they" shot at him first, that he was not doing anything and that he did not know why they were shooting. (pp 2, 7, 8, 15) When he shot back, he was shooting up in the air. (p 3) After being told it did not matter how many guns he had, he admitted having a second gun. (pp 4-5) He said he did not pull out the second gun until he left it on the ground. (pp 8, 12) He only fired with one gun. (pp 7, 12)

When challenged as to how he could hit an officer if he were only firing into the air, petitioner demonstrated that he fired the gun as he was bringing it up. (pp 16-17) He said that he only fired two shots with the first gun. (pp 17-18) When the officers repeatedly asked petitioner if he could have fired more than two shots, petitioner said that he might have fired more shots with the other gun. (pp 16-19) The officers then suggested that, "When you were shooting in the air with the chrome one is when you pulled out the black one?" (p 20) Petitioner agreed, but then said that he did not shoot much with the black gun. (pp 20-21) When asked how many bullets he fired with the black gun, petitioner told them three or maybe four.[2] (pp 21, 24, 50) The officer persistently asked petitioner if he fired the shots from the black gun straight ahead. (Ex No 1, pp 22-24) Petitioner first said yes, and then denied it. (pp 21-22)

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[1] The following page citations all refer to Exhibit No. 1, the transcript of the interrogation submitted at the hearing on the motion to suppress. That transcript covered most of that phase of the interrogation beginning at 9:45 a.m. and lasting until 11:00 a.m.

[2] Evidence at trial established that petitioner fired five or six shots from only one gun, the chrome .357 magnum revolver. (Tr 485, 584-85, 719-20, 730, 771)

Eventually, after police told petitioner that it did not matter whether he had shot at police or civilians, petitioner admitted that he shot into the air because he did not want to damage the officers. (pp 38-50) Near the end of this phase of the interrogation, the officers asked petitioner to describe his *Miranda* rights. (Tr 61-64) Petitioner said, "that it would be better if I told the truth and everything". (p 64) He then asked if that was right. (p 65) When asked if the police promised him anything, petitioner said, "No" and that he did not remember. (pp 65-66) When asked if the police had frightened him in any way, petitioner said he did not remember and then, when pressed, said, "Yes, that, that, that, I was going to, to be, ah, locked up longer. That's what I remember that you told me, right? That, that, that I was going to have more, more trouble, that's all * * * if, if, if I didn't tell the truth, you told me." (pp 66) When asked if he was being honest with the police, petitioner said, "Yes, right now, right now, I have told you everything, I have, because you told me to, right?" (p 69) When asked if he made his statements voluntarily and because he wanted to, petitioner said, "Yes, well, to you all, because you told me that if I didn't you-know-what, didn't you tell me that? I, I, that's why, that's why I told you the whole truth, better you told me. That's right, I, I better tell you everything right now." (pp 69-70)

The interrogation stopped for lunch at 11:00 a.m. and resumed at 11:45 a.m. (Tr 137-38) At that time, Barthel had left. (Tr 138) The interrogation continued until 12:45 p.m. with a 10-minute break in the middle.[3] (Tr 138-39).

After the interrogation was over, Ford and Vega put petitioner in a police car and drove around town so that petitioner could point out his brother's house and his truck. (Tr 139) They had him sign a consent form to search his truck. (Tr 139-40)

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[3] Statements made in that phase of the interrogation were not included in the transcript submitted at the hearing on the motion to suppress. (Tr 12; Exh. No. 1) The pertinent portion of that interrogation is summarized in the trial facts below.

At 2:30 p.m., eleven hours after his arrest, petitioner was jailed. (Tr 142, 155-56) He had been in handcuffs the entire time. (Tr 157)

Defense expert Dr. Jose LaCalle is a clinical psychologist who specializes in "cross-cultural Hispanic" forensic psychology. (Tr 186-90) He evaluated petitioner and found him to be "low average" in intelligence. He has poor language skills even in his native language, Spanish. (Tr 191-96)

Reviewing the translation of the *Miranda* rights used in this case, LaCalle noted that one needed an 8th or 9th grade level of education to understand the construction of the Spanish sentences. (Tr 2220-21) He further explained that it is one thing to understand the language of the *Miranda* rights and another to understand the concept of the rights. In many Latin American areas, including petitioner's native rural Mexico, that concept is completely foreign. The population has great fear of the police. In petitioner's case, his native fear of the police was greatly actualized by the beating he received from police officers. (Tr 196-98, 219-20)

Reviewing the transcript of the interrogation, LaCalle believed that petitioner never understood that he could tell the police that he did not want to talk to them. (Tr 201-06) In sum, in LaCalle's opinion, petitioner did not voluntarily waive his *Miranda* rights. (Tr 206)

LaCalle opined that given petitioner's low intelligence, his native fear of the police, his beating at arrest by the same people who were interrogating him, his lack of sleep, his earlier substance abuse and the length of the interrogation, petitioner's ability to understand what the police were telling him was very limited. His ability to resist the pressures of a very skillful interrogation was also very limited. (Tr 199-200) Given all that, LaCalle believed that petitioner was manipulated through adept and suggestive police questioning into admitting certain statements that were not true. (Tr 206-211, 222-24)

The trial court ruled that that petitioner's statements were voluntary. (Tr 231-34) The court advised defense counsel that it would not help to argue the Vienna Convention issue and summarily denied the motion to suppress on that basis. (Tr 231-32) A copy of the court's order denying petitioner's motion to suppress is attached at App 10-11.

Facts from Trial

Petitioner consumed a large quantity of alcohol. (Tr 381-84, 692-94) Around 3:00 a.m., he went to his girlfriend's duplex and repeatedly demanded to see her although her roommates repeatedly told him that she was not at home. (Tr 338-49, 355-59, 390-98) Petitioner threatened the roommates with one or two guns. *Id.*

At 3:11 a.m., two of the girlfriend's roommates called 911 from a pay phone at a nearby market. At least six police officers responded. (Tr 366, 453-54, 497) Uniformed officers Michael Strouse and Scott Clauson worked their way around the duplexes in the dark to an area at the back of the duplexes. (Tr 456-57, 477, 483, 764, 767-68) They saw a person crouched down, with his back to the officers, peeking around a duplex. (Tr 458, 768-69) It was petitioner. (Tr 459, 480)

Clauson shined his flashlight on petitioner, saw a gun in his hand, identified himself as a police officer and said, "Drop the weapon." (Tr 460, 769) At the moment Clauson shined his flashlight on petitioner, petitioner spun around and began firing his chrome Rossi .357 magnum revolver. (Tr 460-61, 769, 723-27, 732, 775) Strouse and Clauson fired back. (Tr 461-62, 770) Petitioner's bullet hit Clauson in the upper part of his leg, and he fell. (Tr 462, 465, 726, 735) According to Clauson, he was hit by petitioner's second or third shot. (Tr 770)

Strouse changed his location, shined his flashlight on petitioner and both men simultaneously fired at each other. (Tr 462-63) Something whizzed past Strouse's ear. (Tr 462-

63, 480) A bullet from the .357 magnum revolver was later recovered at about chest height from a nearby tree. (Tr 709, 724-25, 728) More shots were exchanged, and petitioner ran off. (Tr 463-64, 492)

The entire exchange of gunfire happened within 10 seconds. Although Strouse described the shooting as almost continuous, the other officers at the scene described the shooting as happening in two volleys. (Tr 459, 463, 484-86, 499, 534-35, 550, 563-64, 571-72) A police detective later questioned Clauson as to who had fired first: Clauson or petitioner. Clauson at first said that he was not sure. After the detective talked Clauson through the episode, Clauson said, "Well, I think he must have shot first." At the time of trial, Clauson was sure petitioner had fired first. (Tr 775-76; Exh. No. 101) All told, between 24 and 30 rounds had been fired. Petitioner had shot off five or six rounds and all from his chrome .357 magnum revolver. (Tr 485, 584-85, 719-20, 730, 771)

Strouse later spotted petitioner crouched down behind a duplex. (Tr 466) As soon as he was spotted, petitioner ran off. (Tr 466-67) Misty Senter's description of petitioner's actions in her backyard was essentially the same as her pretrial testimony. (Tr 433-44) Further testimony regarding petitioner's arrest was substantially similar to that given at the hearing on the motion to suppress. (Tr 435-40, 445-46, 468-71, 507, 536-59, 552-58, 566-69, 576, 578-79)

At the police station, a "drug recognition evaluator" evaluated petitioner and believed petitioner was under the influence of a stimulant, but not to the point where he was really high. (Tr 596, 599-600, 602-04) Blood and urine samples given at 8:52 a.m. tested positive for methamphetamine and amphetamine and showed that petitioner's blood alcohol content was .03 percent at that time. (Tr 594, 614)

Testimony regarding petitioner's extended interrogation was substantially similar to that given at the hearing on the motion to suppress and included additional statements. In those additional statements, petitioner consistently maintained that the police fired first and that he was not trying to kill them. However, he sometimes stated that he knew that he was shooting at police and sometimes stated that he did not know. (Tr 510-16, 522, 608, 610-16, 619, 622, 624, 627-29, 602-03, 630-72, 757-59; Exh. Nos. 41-45, 51, 62, 105)

The jury acquitted petitioner of resisting arrest. It found him guilty of all remaining charges except Count 1, attempted aggravated murder. On that count, it convicted him of the lesser crime of attempted murder.

Petitioner's Case on Appeal

On appeal, petitioner argued that his statements should have been suppressed under both the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitutions, because they were not voluntarily and knowingly made. He also argued that those statements should have been suppressed under the Fourteenth Amendment, because they were obtained in violation of the Vienna Convention. The Court of Appeals affirmed petitioner's convictions without opinion. *Sanchez-Llamas*, 191 Or App 399, 84 P.3d. 1133.

Petitioner made the same arguments before the Oregon Supreme Court. Relying heavily on a presumption against privately enforceable treaties and the State Department's interpretation that private rights do not exist, the court concluded that the Vienna Convention does not confer personally enforceable rights. *Sanchez-Llamas*, 338. Or at 276-77. It did not address petitioner's other claim regarding the voluntariness of his *Miranda* waiver and subsequent statements. *Id.* at 277.

REASONS FOR GRANTING THE WRIT

I. Petitioner's post-arrest statements were obtained in violation of the Vienna Convention and should be suppressed

A. Introduction

The Vienna Convention, 21 U.S.T. 77, T.I.A.S. No 6820, is a multilateral treaty to which both Mexico and the United States are signatories. The treaty was negotiated in 1963 and ratified by this country in 1969. In part, the Vienna Convention requires authorities to notify a detained foreign national of the detainee's right to consular access.

Petitioner is a Mexican national. Police arrested him but did not notify him of his Vienna Convention rights. He was subsequently interrogated for 11 hours and made incriminating statements. Police obtained those statements in violation of Article 36 of the Vienna Convention and the Due Process Clause of the Fourteenth Amendment.

This court granted review in an unrelated case concerning the Vienna Convention in *Medellin v. Dretke*, ___ U.S. ___, ___ S.Ct. ___, ___ L. Ed. 2d. ___, 2005 WL 1200824 (May 23, 2005). This court had granted review in that case to consider two questions: whether the *Avena* judgment was binding on American courts and whether this court should give effect to that judgment as a matter of judicial comity and uniform treaty interpretation. 2005 WL 1200824 at 1. Underlying those issues was the question of whether Article 36(1)(b) created judicially enforceable individual rights. *Id.* at 7 (O'Connor, J., dissenting).

Mr. Medellin was one of the cases considered by the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar 31). The ICJ held that he and others should be granted a review of their Vienna Convention claims in the American judicial system. Mr. Medellin eventually sought a writ of habeas corpus before this Court. In the mean time, President Bush withdrew from the Optional Protocol and

decided to grant Mr. Medellín review in Texas courts in accordance with the *Avena* judgment. This Court subsequently dismissed his petition, because he had sought relief in state court and because various procedural questions might prove to be hurdles to addressing the merits of his claims.

Although petitioner was not a party to the *Avena* case, this case raises the same question underlying *Medellin*: whether Article 36(1)(b) creates judicially enforceable individual rights. It further presents the question of what remedy, if any, applies when police obtain statements in violation of that article. Those questions were preserved below and come to this court on direct review. Therefore, procedural issues do not prevent this Court from considering the merits of petitioner's claims.

B. Article 36 is self-executing and constitutes the "law of the land"

The Supremacy Clause of the United States Constitution requires that courts enforce treaties as the "law of the land." Thus, treaty provisions are enforceable in American courts at the request of affected individuals if those provisions are self-executing. *United States v. Alvarez-Machain*, 504 U.S. 655, 667, 112 S.Ct. 2188, 119 L. Ed. 2d. 441 (1992) ("The Extradition Treaty has the force of law, and if * * * it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation."); *Edye v. Robertson ("Head Money Cases")*, 112 U.S. 580, 598-99, 5 S.Ct. 247, 28 L. Ed. 798 (1884) ("A treaty, then is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."); *United States v. Li*, 206 F.3d. 56, 70-71 (1st Cir.) (Torruella, C.J., dissenting in part), *cert den*, 531 U.S. 956 (2000).

The Vienna Convention is clearly self-executing. *See Medellin*, 2005 WL 1200824 at 15 (O'Connor, J., dissenting) ("Article 36 of the Vienna Convention ***, is, as the United States recognizes, a self-executing treaty.") It requires no implementing legislation to give it force. In addition, petitioner is not aware that the federal government has ever taken a contrary position. Consequently, petitioner will not discuss that point further. Rather, he will address whether the Convention conveys personal rights to foreign detainees.

C. The decisions of the ICJ concluding that individual rights exist under Article 36 should control as a matter of judicial comity and consistent treaty interpretation

In both *Avena* and *LaGrand*, the ICJ determined that Article 36 creates individual rights to consular notification and access. *LaGrand Case (Germany v. United States of America)*, 2001 I.C.J. 466, at ¶ 77 (June 2001); *accord, Avena*, 2004 I.C.J. at ¶ 61.

> "The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand * * *. Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Option Protocol, may be invoked in this Court * * *."

LaGrand, 2001 I.C.J. at ¶77. This court should follow those decisions.

Decisions of foreign courts are entitled to recognition and enforcement in the courts of the United States on the grounds of comity. In *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L. Ed. 95 (1895), the Court explained:

> "'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

Id. at 163-64.

The United States agreed to submit disputes "arising out of the interpretation and application" of the Vienna Convention to the ICJ. It fully litigated before that body in both the *Avena* and *LaGrand* cases. Under those circumstances, the United States courts should recognize and enforce those decisions.

This court should also follow the ICJ decisions in the interest of uniform treaty interpretation. One of the purposes of the Vienna Convention was to achieve uniformity among nations. *Report of the United States Delegation to the United Nations Conference on Consular Relations, reprinted in* Vienna Convention on Consular Relations and Optional Protocol, S. Exec Doc. # 91-9, 41 (1969). When a multilateral convention results from an effort to achieve uniformity, "it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Olympic Airways v. Husain*, 540 U.S. 644, 660-61, 124 S. Ct. 1221, 157 L. Ed. 2d. 1146 (2004) (Scalia, j., dissenting). That objective would be thwarted if each nation were to insist upon its own interpretation of the treaty.

A treaty is like a contract – a multilateral contract in this case – in which parties agree to abide by certain terms. Here, the United States agreed to inform a foreign detainee of his or her right to consular access. In addition, the United States, along with Mexico, agreed under the Optional Protocol to be bound by the ICJ's decisions. The United States took full advantage of its opportunity to litigate before that court. Those countries that still adhere to the Optional Protocol will continue to be bound by the ICJ's interpretation of the treaty. *Avena*, 2004 I.C.J. at ¶ 151 (stating that the court will apply its interpretation and application in future cases). Consequently, the goal of uniformity will fail unless this court adopts the ICJ's interpretation.

In addition, the ICJ's interpretation of the treaty is supported by the principles of construction employed by this court. Therefore, there is no sound justification why this Court should depart from the well-reasoned decisions of the ICJ.

D. This court should interpret the treaty to provide individual rights

The construction of a treaty begins with the "'text of the treaty and the context in which the written words are used.'" *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534, 11 S.Ct. 1489, 113 L. Ed. 2d. 689 (1991) (quoting *Aktiengeseleschaft v. Schlunk*, 496 U.S. 694, 699, 108 S.Ct. 2542, 100 L. Ed. 2d. 722 (1988) (internal quotations in original). *See, Alvarez-Machain*, 504 U.S. at 663-68. General rules of construction may be applied to ambiguous passages. *Eastern Airlines*, 499 U.S. at 535. Treaties are construed more liberally than private agreements, and the courts may look to the history of the treaty, the negotiations, and the practical constructions adopted by the parties. *Id.*

Article 36 the Vienna Convention provides:

> "(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> "(b) *if he so requests*, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights* under this sub-paragraph;
>
> "(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall

> also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. *Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.*
>
> "(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

Vienna Convention, 21 U.S.T. at 100-01 (emphasis added).

Subparagraph (b) first provides that detaining authorities *must* notify the detainee's consulate without delay if "he [the detainee] so requests." Second, it provides that the same authorities must also forward any communication from the detainee to the consulate without delay. Third, it mandates that the detaining authorities inform the detainee without delay of "his rights," *i.e.*, the rights to notify consular representatives and communicate with them. The clear wording refers to the *detainee's rights*. Those rights may be exercised only at the detained person's election. Further, paragraph (1)(c) prohibits consular action if the detained person "expressly opposes such action."

The above language unequivocally articulates a rule by which the rights of individual citizen may be determined. The language is not ambiguous or difficult to understand. If it were a federal statute, there would be no doubt that Article 36 created individual rights.

However, some authorities have relied upon the treaty's preamble to suggest that no private rights were intended. *Li*, 206 F.3d. at 62. The preamble provides in part:

> "The State Parties to the present Convention,
>
> "* * * * *
>
> "Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of

> friendly relations among nations, * * * Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states,
>
> "* * * * *
>
> "Have agreed as follows."

23 U.S.T. at 3230.

The preamble refers to the privileges and immunities of diplomatic representatives in their roles as diplomatic representatives and does not limit the "rights" of private individuals. *Li*, 206 F.3d. at 72-73; Mark J. Kadish, "Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul," 18 *Mich. J. Int'l Law*, 565, 594-96 (1997) (hereinafter *Kadish*). The focus of the Vienna Convention was on consulate relations. *Kadish*, at 594-96. The "individuals" in the preamble are the individual consulate representatives. The preamble simply clarifies that the privileges and immunities granted consular officials under the Vienna Convention are meant to aid the consuls in the performance of their duties and should not be used by consuls as a shield to avoid punishment for wrongdoing. *Id.*

Although the United States Government does not dispute its duty to perform its obligations under Article 36, its litigation position is that the treaty confers no personal rights. *See e.g., LaGrand*, 2001 I.C.J. at ¶ 76. However, that position should be given little weight. Indeed, if the Executive Department's instant policy were the sole or even primary tool to construe a treaty, this Court would never truly construe a treaty, but merely defer to the executive construction, which would change with the political wind.

E. Police violated petitioner's rights under Article 36

Defense counsel's affidavit in support of the motion to suppress averred: "Petitioner is a foreign national and was not advised of his right to consult with the Mexican Counsel [sic]." (Rec

40; attached at App 3). The state agreed that petitioner was a Mexican citizen and that it failed to inform petitioner of his rights under the Vienna Convention. (Answer to Def's Mtn to Suppress, at p 2; Rec 72). Consequently, there is no dispute that petitioner was arrested and that the state did not comply with its Vienna Convention obligations.

F. Suppression is required under the United States Constitution

Suppression is not always required for nonconstitutional violations. *See United States v. Caceres*, 440 U.S. 741, 749, 99 S.Ct. 1465, 59 L. Ed. 2d. 733 (1979) (exclusion was inappropriate where agency's violation of its regulation did not implicate constitutional or statutory rights). However, this Court has upheld suppression where "the rules were designed 'to afford [the alien] due process of law' by providing 'safeguards against essentially unfair procedures.'" *Caceres,* 440 U.S. at 749 (quoting *Bridges v. Wixon*, 326 U.S. 135, 152-53, 65 S.Ct. 1443, 89 L Ed 2103 (1945)), *see United States v. Lombera-Camorlinga*, 206 F.3d. 882, 893 n 2 (9th Cir) (Thomas, J. dissenting, citing cases), *cert den*, 531 U.S. 991 (2000).

The purpose of suppression, at least in regards to illegal search and seizures, is to deter "future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L. Ed. 2d. 34 (1995). "As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." *Id.* at 11. Therefore, the circuit courts have sanctioned suppression of evidence as a remedy when there is a "deliberate disregard of the rule" or "if the petitioner was prejudiced." *Lombera-Camorlinga*, 206 F.3d. at 893 n 2 (quoting *United States v. Gantt*, 194 F.3d. 987, 994 (9th Cir 1999)).

A different standard, however, applies to the exclusion of confessions. In those situations, the remedy's roots lie in the common law. *Dickerson v. United States*, 530 U.S.

428, 433, 120 S.Ct. 1602, 147 L. Ed. 2d. 405 (2000) (citing cases and holding that warnings required under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d. 694 (1966) are constitutionally based). Suppression of tainted confessions is required under both the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. *Dickerson*, 530 U.S. at 433. In more recent years, however, the Court has come to rely on the Due Process Clause. *Id.* at 434.

The federal circuit courts that have addressed Vienna Convention violations have not addressed whether the treaty confers personal rights. Instead, they have held that the suppression of statements is not an appropriate remedy because the treaty does not specifically require that remedy. *E.g.*, *United States v. Chaparro-Alcantara*, 226 F.3d. 616, 621-22 (7th Cir), *cert den*, 531 U.S. 1026 (2000); *Lombera-Camorlinga*, 206 F.3d. at 886-87; *Li*, 206 F.3d. at 61-62. Petitioner agrees that the Vienna Convention does not *explicitly* call for suppression. Instead, given the signatories' diverse political structures and systems of justice, paragraph 2 of Article 36 requires each country to integrate the treaty's requirements into that country's legal system.

Paragraph 36(2) requires that the laws of the receiving state give "full effect" to the purposes intended for the "rights" established under the treaty. That language is sufficient to require suppression of statements as a remedy for treaty violations because it is the only remedy provided by the laws of this country that would give "full effect" to the purposes of the treaty.

Violations of Article 36 should result in suppression of statements because those rights constitute procedural protections associated with interrogation and criminal prosecution. Therefore, they are akin to *Miranda* rights and serve similar purposes. *Miranda* warnings are required in order to even the playing field by ensuring that the suspect understands that he has a

right not to talk and a right to counsel. *Dickerson*, 530 U.S. at 435 (citing *Miranda*, 384 U.S. at 439, 445).

Article 36 also operates to safeguard against unfairness. Notification of the right to consular access is a procedural right granted to foreign nationals who suddenly find themselves enmeshed in an alien legal system. The right to contact one's consulate serves an obvious purpose. Because foreign nationals often have little or no knowledge of a receiving state's criminal system and principles, they are granted a right to contact their consulate without delay. That enables the consulate to assist the foreign national in understanding that system and arranging for legal representation if necessary. Mexico described its range of assistance in a letter it provided to the Joint Interim Committee of the Oregon State Legislature, and it attached that letter to the amicus brief that it filed in *State v. Chavez*, 335 Or. 44, 56 P.3d. 923 (2002) (letter attached to this petition at App 25-29). Because of the importance of consular notification to procedural fairness, petitioner is entitled to the suppression of his statements.

Petitioner is also entitled to suppression because of the egregious nature of the police misconduct. The treaty has been the law for over 35 years. However, violations continue to occur on a regular basis. The state's disregard for the treaty plainly illustrates why suppression is the most likely remedy to secure law enforcement's compliance with the treaty's terms. Unless and until consular notification and access is enforced by means of suppression, violations will continue to occur on a regular basis.

Petitioner is particularly entitled to the suppression of his statements given the lengthy and coercive nature of his interrogation and his limited abilities to understand the criminal justice system. As explained in Part II of this petition, given the totality of the circumstance the officers'

failure to properly advise petitioner of his rights under the treaty contributed to an involuntary and unknowing waiver of his Miranda rights and subsequent inculpatory statements.

II. Petitioner's statements were not voluntary and must be suppressed

The second question in this case presents the issue of whether defendant's statements should have been suppressed under the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner acknowledges that this court has examined the voluntariness of *Miranda* waivers under coercive circumstances in the past. However, this case presents that question in the unique light of the police failure to inform petitioner of his Vienna Convention rights to consular notification and access. Consequently, it presents a question of first impression.

A. The right to remain silent must be voluntarily and knowingly waived

The Fourteenth Amendment requires the state to prove by a preponderance of the evidence that a self-incriminating statement was voluntary, that is, that police conduct did not overbear the suspect's will or critically impair the suspect's capacity for self-determination. U.S. Const, Amend XIV; *Colombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L. Ed. 2d. 1037 (1961)(if a suspect has voluntarily willed to confess, the statement may be used against him; if his will has been overborne or his capacity for self-determination critically impaired, the use of his confession offends due process and may not be used); *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L. Ed. 2d. 618 (1972)(the state must prove voluntariness by a preponderance of the evidence).

The totality of the circumstances determines whether a confession or admission is voluntary. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L. Ed. 2d. 302 (1991). The factors informing a voluntariness determination may be categorized into three groups: 1) the characteristics of the accused; 2) the conditions of interrogation; and 3) the conduct of law-

enforcement officials. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 36 L. Ed. 2d. 854 (1973)(court will assess both the characteristics of the accused and the details of the interrogation). A confession must not be extracted by any threats of violence or obtained by direct or implied promises. *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1485, 12 L. Ed. 2d. 653 (1964). Voluntariness is determined without regard to the truth of falsity of a confession. *Rogers v. Richmond*, 365 U.S. 534, 540-42, 81 S.Ct. 735, 5 L. Ed. 2d. 760 (1961).

Custodial interrogations, by their very nature, generate compelling pressures which undermine an individual's will to resist and compel him or her to speak. *Miranda*, 344 U.S. at 467. Under the Fifth Amendment, in order to establish that a suspect's in-custody statements are truly voluntary, the state must show two things: first, that the suspect was adequately and effectively apprised of his or her constitutional privilege against self-incrimination and right to counsel before interrogation and, if exercised, that the exercise of those rights were honored; and second, if waived, that the suspect knowingly and intelligently waived those rights. *Id.* at 467-77. The waiver must have been made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L. Ed. 2d. 410 (1986). The waiver is examined in the light of the totality of the circumstances. *Id.* Evidence that the suspect was threatened, tricked or cajoled shows that the suspect did *not* voluntarily waive his privilege. *Miranda*, 384 U.S. at 476; *Moran*, 475 U.S. at 421 (the relinquishment of the right must have been the product of a free and deliberate choice rather than intimidation, coercion or deception).

B. Petitioner's statements were not knowingly and voluntarily made

In this case, the evidence was uncontested that petitioner was a man of low intelligence who came from an area in Mexico where people greatly fear the police and do not believe that they can refuse to answer police questions. Petitioner, justified or not, was beaten by several police officers a few short hours before his interrogation. He was suffering from the effects of that beating during the interrogation. He was also "slurry", lethargic and "coming off" an alcohol binge and was deprived of sleep.

The entire interrogation lasted 11 hours – from about 3:30 a.m. when he was arrested to about 2:30 p.m. when he was jailed. Petitioner was in handcuffs the entire time. For most of the interrogation, except for a visit to the hospital, petitioner was confined to a small room with at least three officers. In the hospital, the questioning persisted between administrations of medical treatment.

The officers twice read petitioner his *Miranda* rights in Spanish, but the construction of the sentences required an 8th or 9th grade level of education to understand. Petitioner had poor language skills in his native language. At the start of the "heart" of the interrogation – beginning at 9:45 a.m. and continuing, with a short break for lunch, until 12:45 – a police officer told petitioner that the police "are going to find out anyway, so [it's] better that you talk now. Better than * * * later, they go after you more, ok?"

Petitioner proved very suggestible during the interrogation. His story changed continually. For the most part, the police only let go of a line of questioning after petitioner had agreed to their version of the events. Petitioner even admitted to a version of the events that later-acquired police evidence disproved: that petitioner shot both of his guns and not just one.

Midway through this last phase of the interrogation, the police asked petitioner to describe his rights. He described his rights as follows, "that it would be better if I told the truth and everything." That is by no means an accurate description of his *Miranda* rights. When asked if the police had frightened him, petitioner said, "Yes, that, that, that, I was going to, to be, ah, locked up longer. That's what I remember that you told me, right? That, that, that I was going to have more, more trouble, that's all * * * if, if, if I didn't tell the truth, you told me." Petitioner was obviously referring to the police officer's statement that the police "are going to find out anyway, so [it's] better that you talk now. Better than * * * later, they go after you more, ok?"

In addition, police violated petitioner's rights under the Vienna Convention. That police misconduct should weigh heavily against finding a voluntary and knowing waiver. The failure to advise petitioner of his rights to contact and communicate with his consulate disavailed petitioner of the very procedures that were established to ensure that he understood his rights in the American criminal justice system.

Given the totality of the circumstances, petitioner did not understand and voluntarily waive his *Miranda* rights and did not voluntarily give statements to the police.

C. Prejudicial Error Analysis

The admission of coerced confessions obtained in violation of the Fifth Amendment is subject to a harmless error analysis. *Fulminante*, 499 U.S. at 310. Before the constitutional error can be held harmless, the state must show, beyond a reasonable doubt, that the admission of the confession did not contribute to the petitioner's conviction. *Id.* at 310-12. An appellate court should keep in mind that a confession is probably the most probative and damaging evidence, that the impact on the jury is great and that a jury may be tempted to reach its decision by relying on that evidence alone. *Id.* at 296.

In this case, there is no question as to whether or not petitioner shot at the police officers and wounded one of them. He did. The issue at trial was petitioner's intent when he did so.

By the time the interrogating police officers were done with petitioner, he had made some damaging admissions. He admitted knowing the police were in the area looking for him. He admitted that he was lying in wait with a gun in his hand. He admitted that if the officers were going to shoot at him, he was going to shoot back. He admitted knowing that it was the police he was shooting at. He admitted shooting "straight ahead."

That evidence surely tipped the scales in favor of petitioner's convictions. It disproved any reckless intent. It made petitioner out to be a killer. And if the jury spared him a conviction of attempted aggravated murder on Count 1 because it did not believe that petitioner immediately knew he was shooting at police, the evidence ensured petitioner's conviction of attempted murder of that officer and of attempted aggravated murder of the second officer at whom petitioner shot just seconds later. Further, that evidence ensured petitioner's conviction for assault in the first degree.

It cannot be said then that the admission of petitioner's involuntary statements was harmless beyond a reasonable doubt. The trial court's error was prejudicial error. It warrants the reversal of petitioner's convictions for attempted murder, attempted aggravated murder and assault in the first degree.

CONCLUSION

The petition for writ or certiorari should be granted. With respect to both issues presented in this petition, petitioner requests that this court remand to the Oregon Supreme Court with instructions to suppress his statements and remand his case for a new trial.

Respectfully Submitted,

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON FOR JACKSON COUNTY

STATE OF OREGON, Plaintiff, vs. MOISES SANCHEZ-LLAMAS, Defendant	Case No.: Case No.: 99-6212-FE MOTION TO SUPPRESS

1.

Defendant requests oral argument and anticipates the taking of evidence and argument on this motion will take one day.

2.

Defendant moves the court for an order suppressing all observations of the accused, statements, admissions or confessions of the accused, and the fruits thereof, upon the following grounds:

1. That the same were obtained in violation of applicable state statutes, the Constitution of Oregon, and the Constitution of the United States;
2. The lack of voluntariness under the Oregon Constitution and United States Constitution.

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BEST AVAILABLE COPY

Defendant relies in this motion upon ORS 136.425 (1), Article I, section 12. of the Oregon Constitution and the Fifth Amendment, United States Constitution.

Dated this 19th day of September, 2000

Robert L. Abel OSB #70001
Attorney for Defendant

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON FOR JACKSON COUNTY

STATE OF OREGON, Plaintiff, vs. MOISES SANCHEZ-LLAMAS, Defendant	Case No.: Case No.: 99-6212-FE AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS

THE STATE OF OREGON)
)ss.
County of Jackson)

I, Robert L. Abel, being first duly sworn on oath, do hereby depose ands say:

I am the attorney for the above named defendant.

I have read the police reports and talked with the defendant regarding the facts and circumstances surrounding the interrogation conducted by police officers on December 18,2000.

Based on information and belief from these sources, the facts and circumstances relevant to this Motion to Suppress are as follows:

1. Defendant is a foreign national and was not advised of his right to consult with the Mexican Counsel;
2. Defendant was not properly advised of his Miranda rights;
3. Statements of the defendant were not made voluntarily.

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I make this affidavit in support of my motion to suppress.

Dated this 19th day of September, 2000

Robert L. Abel OSB #70001
Attorney for Defendant

SUBSCRIBED AND SWORN TO before me this 19th day of September 2000.

OFFICIAL SEAL
STEVE CHASE
NOTARY PUBLIC - OREGON
COMMISSION NO. 302656
MY COMMISSION EXPIRES JULY 2, 2001

Notary Public for Oregon
My Commission Expires 7/2/01

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON FOR JACKSON COUNTY

STATE OF OREGON, Plaintiff, vs. MOISES SANCHEZ-LLAMAS, Defendant	Case No.: Case No.: 99-6212-FE MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

I.

DEFENDANT, A FOREIGN NATIONAL, WAS NOT ADVISED OF HIS RIGHT TO CONSULT WITH THE MEXICAN COUNSEL

Article 36 of the Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, 21 U.S.T. 77-123 (1970), T.I.A.S. No. 6820 (hereafter "the Convention") provides:

"Article 36

"COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> "(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication

addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

"(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody, or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

"2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

The Vienna Convention was signed by the United States in Vienna in 1963 and ratified on September 24, 1969, taking effect on December 24, 1969. 115 Cong.Rec. 30,945 (1969). The regulations of the Immigration and Naturalization Service provide that "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality," and that, for some nationalities, the consul be immediately notified when a foreign national is detained by local authorities. 8 C.F.R. § 242.2(g) (1997). This section was enacted to ensure compliance with Article 36 of the Convention. United States v. Calderon-Medina, 591 F.2d 529, 531-32 n.6 (9th Cir. 1979).

The Supremacy Clause, Article VI of the United States Constitution, provides that

"[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding" (Emphasis added).

The United States Supreme Court has stated that "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982), quoting Maximov v. United States, 373 U.S. 49, 54, 83 S.Ct. 1054, 1057 (1963). Furthermore, "[i]t is axiomatic that the State must adhere to United States treaties as the supreme law of the land."

Arteaga v. Texas Department of Protective and Regulatory Services, 924 S.W.2d 756, 761 (Tex.App.-Austin 1996). (citing to Supremacy Clause).

The drafters of the Article 36 were clearly concerned with the ability of consular officers to speak with nationals of the sending State imprisoned in the jurisdiction of the receiving State. Sub-paragraph (1)(a) provides a general right of communication with nationals of the sending state. Sub-paragraph (1)(b), however, requires competent authorities who have been notified to do so to inform the consular post if foreign nationals are "detained in any . . . manner," to forward communications between the national and the consul, and to so inform the national. Sup-paragraph (1)(c) allows consular officials to visit, converse and correspond with the detained nationals, and to arrange for the national's representation.

Consequently, the text and context of Article 36 implicate rights similar to those which led the Supreme Court to hold that, because a criminal defendant may not know of his constitutional right to an attorney, the police must inform the accused of that right so that he may knowingly exercise or waive that right once taken into custody. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). A foreign national is particularly in need of such advice. A foreign national accused of crime may be deported if convicted. Legal systems and the availability of legal protections may differ wildly from those of the sending State. The national may not even speak the language of the receiving State, thus being doubly disadvantaged. Article 36 alleviates this problem by requiring the police to notify the accused of his right to speak with consul, and to notify the consul of the national's detention. Article 36 allows the consul, a person the accused may be more able to trust, to speak with the accused. The foreign national can get information, from a fellow native speaker, regarding the differences between the two legal systems. Defendants from countries with authoritarian regimes may fear their own torture, murder, or retaliation for not cooperating. Thus, common police practices such as feigning anger, raising the voice, cursing, the wearing of weapons, and isolation of the subject in an interrogation room may invoke a quite reasonable terror in a foreign national. Furthermore, language difficulties may prevent the foreign accused from knowingly exercising his or her Miranda rights.

The remedy for a violation of a foreign national's right to be informed of the ability to speak with consul should be suppression. Cf. Montilla v. INS, 926 F.2d 162, 170 (2nd Cir. 1991) (invalidating deportation proceeding appropriate remedy where constitutional or statutory right implicated) with Waldron v. INS, 17 F.3d 511, 518

(1993) (affirming deportation proceeding appropriate remedy where no prejudice results from violation of administrative rule). The Due Process provisions of the Fifth Amendment of the United States Constitution apply to foreign nationals. See Montilla, 926 F.2d at 166. The Supremacy Clause provides that the Constitution, statute, and treaties of the United States are the supreme law of the land. Consequently, the treaty at issue herein is more like a statutory or constitutional right than the INS regulation at issue in Waldron.

Similarly, exclusion of evidence is the proper remedy for a violation of a person's constitutional rights. Weeks v. United States, 232 U.S. 383, 393, 34 S.Ct. 341, 58 L.Ed. 652 (1914) (excluding evidence appropriate remedy for violation of 4th Amendment protection against unreasonable searches); Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967) (excluding underlying, invalid conviction appropriate remedy for violation of 6th Amendment right to counsel).

"This nation must manifest integrity in our treaties with foreign countries. To honor the provisions of Article 36 of the [Convention] . . . mandates a sense of justice and decency. To do anything less is a severe erosive compromise of our very essence equal if not greater than a Constitutional violation." United States v. Calderon-Medina, 591 F.2d 529, 532 (1979) (Takasugi, J., dissenting).

II.

The Defendant, Moises Sanchez-Llamas, seeks to have the Court exclude from evidence herein all statements, admissions and confessions elicited from him during the course of questioning by police officers on December 18, 1999. Defendant argues that he made the statements involuntarily and without knowingly and intelligently waiving his Miranda rights and, accordingly, the state's use of the statements violated Article I, section 12, of the Oregon Constitution and the Fifth Amendment. Defendant further argues the confession or admissions are inadmissible under the provisions of ORS 136.425 (1).

Defendant is a Mexican National who speaks no English. On December 18, 1999 at approximately 3:30 a.m. he was arrested at or near Columbus Avenue, Medford, Oregon. His arrest followed the shooting of a Medford Police Officer.

During the course of the arrest the defendant suffered physical injuries. Evidence will also establish that he had consumed alcohol and used methamphetamine. The defendant was questioned by various officers from 3:45 a.m. to 12:45 p.m. on December 18, 1999.

In State v. Cochran, 72 Or. App. 499, 512 the Court states:

"The fundamental test of admissibility is whether defendant's actions were voluntary. Schneckloth v. Bustamonte, 412 U.S.218 (1973). It is the state's burden to prove that defendant's actions were voluntary by the clear weight of the evidence. State v. Burdick, 57 Or. App. 601 (1983). No single test of voluntariness is determinative; a court must consider the 'totality of the circumstances'."

When considering whether or not a waiver is valid, (i.e. voluntary, knowing, and intelligent) factors such as the defendant's age, education, intelligence, cognitive functioning, mental state, length of detention, coerciveness of police, and the defendant's knowledge of the right to refuse consent, must be examined within the context of culture and language.

In State v. Corona, 60 Or. App. 500, 506 the court stated:

"The analysis of voluntariness of a confession and voluntariness of a waiver of rights is the same. State v. Foster, 288 Or. 649 (1980). The proper inquiry regarding intoxication is whether 'by reason of extreme intoxication a confession cannot be said to be the product of a rational intellect and free will.' "

This same analysis would apply to any of the factors set forth in the preceding paragraph. In the instant case the Defendant speaks no English, was physically beaten during the process of arrest, interviewed over a period of nine hours by several different officers, including three Spanish speaking translators. The officers used well know manipulating techniques such as implanting statements, and circular techniques in which the same question is asked again and again in the span of several hours. The defendant has a very limited education and a low functional IQ.

Respectfully submitted.

Dated this 17th day of September, 2000.

Robert L. Abel OSB #70001
Attorney for Defendant

ENTERED AND FILED

App 10
2000

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

STATE OF OREGON, Plaintiff, v. MOISES SANCHEZ-LLAMAS Defendant.	NO. 99-6212-FE FINDINGS AND ORDER ON MOTION TO SUPPRESS

THIS MATTER having come before the Court for hearing on defendant's Motion to Suppress on November 16, 2000, the State appearing by Mark Huddleston, District Attorney, and defendant appearing personally and with his attorney, Robert L. Abel, and the Court having heard testimony from Detectives Terry Newell and Bill Ford of the Medford Police Department, Officers Michael Strouse and Curtis Whipple of the Medford Police Department, Medford Police Community Service Officer Arturo Vega, Nurse Betty Martinez, Dr. Jeffrey William, Mercy Flights EMT Susan Shelters and Clinical Psychologist Dr. Jose LaCalle, and the Court having examined the exhibits offered and having heard statements of counsel and being fully advised in the premises, hereby finds

1. That any violation of the Vienna Convention that may have occurred in this case does not require suppression of the defendant's statements;

2. The Court finds by clear and convincing evidence that defendant understood his Miranda rights and knowingly, intelligently and voluntarily waived his right to remain silent

JACKSON COUNTY DISTRICT ATTORNEY
Criminal Division • 715 West 10th St
Medford OR 97501 • (541) 774-8181

and to have an attorney present during questionining;

3. The court finds by clear and convincing evidence, given the totality of the circumstances, that the defendant's statement was voluntary.

Accordingly, defendant's Motion to Suppress is denied in its entirety.

DATED this 1 day of Dec., 2000.

R. W. White
Circuit Court Judge

cc: Robert Abel

ENTERED AND FILED

2000

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Criminal Division • 715 West 10th St.
Medford, OR 97501 • (541) 774-8181

CAPTION(Rev 1/00)

CASES AFFIRMED WITHOUT OPINION

(84 P3d 1133)

January 7, 2004

City of Eugene v. Biersdorff et al and Lane County and Boler et al (A119418)
Downs, Elizabeth Diane v. McGee (A118454), *rev den*, 336 Or 615
Hartford v. Department of Human Services (A120738)
In the Matter of Armstrong, Josh, Alleged to be a Mentally Ill Person. State v. Armstrong, Josh (A120370)
In the Matter of the Suspension of the Driving Privileges of Carpenter, Cory v. Oregon Department of Transportation, Driver and Motor Vehicle Services Division (DMV) (A120410), *rev den*, 336 Or 534
Kamph, John Everett v. Lampert (A118256)
May v. Burdick (A117744)
State v. Sanchez-Llamas, Moises (A114418)
State v. Thomas, Dee Swiss, IV (A117881-84), *rev den*, 336 Or 657
Stull v. Lewis & Clark College et al (A113988)

January 14, 2004

Brodkey v. Employment Department et al (A119968)
Davidson v. Clatsop County (A115059)
In the Matter of Herrick, Noah and Herrick, Austin, Minor Children. State ex rel Juvenile Department of Multnomah County v. Herrick-Carlson (A121889), *rev den*, 336 Or 615
In the Matter of Sullivan, Sonya M., Alleged to be a Mentally Ill Person. State v. Sullivan, Sonya M. (A118997)
In the Matter of the Compensation of Gomez, Christopher D., Claimant. Gomez v. Liberty Northwest Insurance Corporation et al (A119320)
In the Matter of the Marriage of Murphy and Murphy (A120087)
In the Matter of Zongor, Dorothea Rose, Alleged to be a Mentally Ill Person. State v. Zongor, Dorothea Rose (A117920)
State v. Butterfield, Brian Ken (A118098)
State v. Cechmanek, Earl Joseph (A119068)
State v. Sweet, Izear (A116731)
State v. Wright, James Dean (A115345-47)
State v. Zastera, Jerry Lee (A114282/83)

PETITIONS FOR REVIEW

(93 P3d 71)

ALLOWED

May 18, 2004

Bryant v. Walker (A118386)(S51067)(190 Or App 253), *dismissed as improvidently allowed*, 337 Or 585
State v. Sanchez-Llamas, Moises (A114418)(S51289)(191 Or App 399)

DENIED

May 18, 2004

Castellano, Patrick R. v. Schiedler (A117616)(S51354)(192 Or App 602)
Castle, Jeffrey Lynn v. Palmateer (A120401)(S51318)(192 Or App 602)
Hammer v. Clackamas County (A122139)(S51249)(190 Or App 473)
Hertel v. Marquis Companies I, Inc. (A120351)(S51251)(192 Or App 162)
Johnson, Cary Joseph v. Lampert (A115085)(S51277)(190 Or App 304)
Kamph, John Everett v. Lampert (A118256)(S51334)(191 Or App 399)
Liberty Northwest Insurance Corporation v. Kemp (A118217)(S51275)(192 Or App 181). Balmer and Kistler, JJ., would allow.
McLean v. Charles Ellis Realty, Inc. (A112916)(S51143)(189 Or App 417)(petition of Lemke)
McLean v. Charles Ellis Realty, Inc. (A112916)(S51144)(189 Or App 417)(petition of McLean)
McLean v. Charles Ellis Realty, Inc. (A112916)(S51189)(189 Or App 417)(petition of Charles Ellis Reality, Inc., and Jensen)
Phiffer, Billy Ray v. State of Oregon (A117527)(S51269)(191 Or App 306)
State ex rel Department of Human Services v. Lind (A122225)(S51315)(192 Or App 362)
State ex rel Department of Human Services v. Smith (A119798)(S51293)(190 Or App 570), *denial withdrawn and review allowed*, 337 Or 247
State ex rel Juvenile Department of Multnomah County v. Atterberry (A119552) (S51306)(191 Or App 305)
State v. Basargin, Joseph Savin (A117904)(S51303)(192 Or App 487)
State v. Biagi, Anthony (A118460)(S51286)(190 Or App 399)
State v. Boyd, William Chandler, Jr. (A118957)(S51245)(192 Or App 163)
State v. Gannon, Greg Joseph (A118840)(S51364)(192 Or App 603)
State v. Herrera-Perez, Armando (A113877)(S51322)(191 Or App 654)
State v. Jones, Suzan Anne (A116975)(S51340)(192 Or App 487)
State v. Jones, William Lee, III (A118173)(S51307)(191 Or App 654)
State v. Linville, Richard Abe (A116335)(S51314)(190 Or App 185)
State v. Martinez, Jennie (A118033)(S51333)(191 Or App 653)
State v. Matlock, Tommy L. (A118822)(S51324)(192 Or App 163)
State v. Miles, Suzanne (A117376)(S51332)(191 Or App 654)
State v. Nale, Henry Paul (A118956)(S51337)(192 Or App 673)
State v. Nunley, Walter D. (A119187)(S51230)(191 Or App 653)
State v. Peck, Michael Ari (A117560)(S51254)(192 Or App 364)
State v. Rivera, Timothy (A117982)(S51355)(192 Or App 362)
State v. Umtuch, George M., III (A117313)(S51341)(192 Or App 364)
State v. Westfall, Lance M. (A115193)(S51326)(192 Or App 487)
Stryffeler, Darold Allen v. Lampert (A113298)(S51308)(192 Or App 363)
White v. Vocational Rehabilitation Services (A118504)(S51120)(191 Or App 306)

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent on Review,
v.
MOISES SANCHEZ-LLAMAS,
Petitioner on Review.
(CC 996212FE; CA A114418; SC S51289)

En Banc

On review from the Court of Appeals.*

Argued and submitted November 4, 2004.

Susan Fair Drake, Senior Deputy Public Defender, Salem, argued the cause and filed the brief for petitioner on review. With her on the brief were Peter A. Ozanne, Executive Director, and Peter Gartlan, Chief Defender, Office of Public Defense Services.

Mary H. Williams, Solicitor General, Salem, argued the cause and filed the brief for respondent on review. With her on the brief was Hardy Myers, Attorney General.

GILLETTE, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

* Appeal from Jackson County Circuit Court, Raymond B. White, Judge. 191 Or App 399, 84 P3d 1133 (2004).

GILLETTE, J.

In this criminal case, defendant contends that the trial court committed reversible error by refusing to suppress his post-arrest statements to the police. The Court of Appeals affirmed the judgment of the trial court. *State v. Sanchez-Llamas*, 191 Or App 399, 84 P3d 1133 (2004). We allowed defendant's petition for review to consider his contention that the police violated his right to consular notification and communication, as guaranteed by Article 36 of the Vienna Convention on Consular Relations (VCCR),[1] and that suppression of his post-arrest statements is the necessary and appropriate remedy for that violation.[2] As we explain below, we conclude that Article 36 of the VCCR does not create rights that individual foreign nationals may assert in a criminal proceeding. Accordingly, we affirm the judgment of the trial court and the decision of the Court of Appeals.

Defendant is a Mexican national. He was arrested in December 1999 after an incident in which he exchanged gunfire with police officers and wounded one officer in the leg. Shortly after defendant's arrest, the police read him *Miranda* warnings in English and Spanish. The police did not inform defendant at that time, or at any time thereafter, that he had any "right" under Article 36 of the VCCR to communicate with the Mexican consulate and to have the consulate informed of his arrest. Neither did the police inform the Mexican consulate of defendant's arrest.

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[1] As we explain more fully later in this opinion, the VCCR is a multilateral treaty that purports to define the functions of a consulate and govern the establishment of consular relations between the signatory nations. *See United States v. Emuegbunam*, 268 F3d 377, 388 (6th Cir 2001), *cert den*, 535 US 977 (2002) (describing treaty). As we explain elsewhere, defendant is a Mexican national. The United States and Mexico both are signatories. Generally, Article 36 of the VCCR requires "competent authorities" to inform the relevant consulate when a foreign national is arrested and to allow the consulate to communicate with the detained foreign national and vice-versa. Article 36 also requires authorities to advise detained foreign nationals "without delay" of those "rights."

[2] Defendant asserts an alternate theory for suppression, *viz.*, that the circumstances surrounding his arrest and detention show that his post-arrest statements, including his purported waiver of his *Miranda* rights, were not made voluntarily. However, we elect to limit our review to the issue that defendant raises under the VCCR. *See* ORAP 9.20(2)(court's opinion on review need not address all questions raised by petition).

The police proceeded to interrogate defendant, who eventually made a number of incriminating statements. Later, defendant was charged with attempted murder, attempted aggravated murder, and various other crimes. Before his trial on those charges, defendant moved to suppress his post-arrest statements to the police on the ground, *inter alia*, that the police had failed to inform him of his "rights" under the VCCR to consular access and notification. The trial court denied the motion, ruling, with respect to defendant's argument under the VCCR, that "any violation of the Vienna Convention that may have occurred * * * [did] not require suppression of defendant's statements." Defendant subsequently was convicted of 11 felony counts and sentenced to a total of 246 months in prison. As noted, the Court of Appeals affirmed the convictions and sentences on defendant's direct appeal.

Before this court, defendant continues to assert that his post-arrest statements should have been suppressed in order to vindicate his rights under Article 36 of the VCCR. The state responds that that claim fails for at least two reasons: (1) Article 36 of the VCCR does not confer individual rights that a detained foreign national may assert in a criminal proceeding; and (2) even if Article 36 did confer such rights, suppression of post-arrest statements to the police would not be the appropriate or required remedy for their violation. We focus, in this opinion, on the first argument.

We begin with the VCCR itself—a multilateral treaty that the United Nations adopted in 1963 and that the United States Senate ratified in 1969. Among its 79 articles is Article 36, which provides, in part:

> "(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> "(b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a

> national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> "* * * * *
>
> "(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

VCCR, Art 36, 21 UST 77, 100-01.

Defendant contends that subparagraph (1)(b) above clearly creates an individual right of consular access and notification, including a personal and enforceable right to be advised "without delay" of those rights. Defendant notes, in that regard, that the provision expressly makes consular notification a matter of personal election by the foreign national who is detained: It requires authorities to notify the detainee's consulate only "if [the detainee] so requests."[3] Defendant points out, also, that subparagraph (1)(b) explicitly refers to "rights" of consular notification and access, and describes those rights as belonging to the detained individual ("[t]he said authorities shall inform the person concerned without delay of *his* rights under this subparagraph" (emphasis added)).

Defendant further contends that, as a ratified treaty, the VCCR is a part of the "supreme law of the land"

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[3] Defendant notes that another subparagraph of Article 36 that is not included in the quoted material above also makes consular *assistance* a matter of personal election by the person detained: Under subparagraph (1)(c) of Article 36 consular officers must refrain from acting on behalf of a detained national "if he expressly opposes such action."

and, as such, stands on equal footing with laws that the national legislature has enacted.[4] In defendant's view, that means that Article 36 is enforceable by affected individuals in the same way and to the same extent as any federal statute would be. With respect to that latter point, defendant appeals to the "doctrine of self-execution"—the idea that certain international treaties are "self-executing," that is, immediately effective and enforceable by individuals without additional implementing legislation.

However, that is an issue of federal law, and the federal cases suggest that treaties are "self-executing," in the sense of permitting enforcement by an individual right of action, only when a specific intent to create such individual rights can be discerned from the treaty as a whole. *See, e.g.*, *Edye v. Robertson*, 112 US 580, 598-99, 5 S Ct 247, 28 L Ed 798 (1894) ("Head Money Cases") ("A treaty * * * is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined*." (emphasis added)); *Goldstar (Panama) S.A. v. U.S.*, 967 F2d 965, 968 (4th Cir 1992) ("Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.").[5] In fact, the general rule, widely recognized in the federal courts, is that rights created by international treaties belong to the signatory state and are *not* enforceable in American courts by private individuals. Thus, the United States Supreme Court has stated:

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[4] So far as it goes, defendant's point in that regard is unassailable. Article VI of the United States Constitution provides, in part:

> "This Constitution, and the Laws of the United States * * * and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(Emphasis added.) Thus, as a ratified treaty, the VCCR is a part of the "supreme law of the land." But this case is not about the status *of* the VCCR; it is about defendant's status as an arrested national of a signatory state *under* the VCCR.

[5] In fact, it is at least arguable that the question whether a treaty is "self-executing"—enforceable without additional legislation—is different from the question whether it is individually enforceable in a judicial proceeding. *See U.S. v. Li*, 206 F3d 56, 67 (1st Cir 2000) (Selya and Boudin, JJ., concurring) (asserting that the two questions are different).

> "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress. * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress."

Edye, 112 US at 598. *See also Foster v. Neilson*, 27 US (2 Pet) 253, 306, 7 L Ed 415 (1829), *overruled in part on different grounds*, *U.S. v. Percheman*, 32 US 51 (1833) ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided."); *Goldstar (Panama) S.A.*, 967 F2d at 968 ("International treaties are not presumed to create rights that are privately enforceable.").

The rationale for the foregoing general rule (which in substance amounts to a presumption *against* the creation of individual, judicially enforceable rights) is obvious. The United States Constitution separates the various functions of government among the three branches, generally placing the powers that relate to foreign relations in the Executive Branch (with certain oversight powers, including the power to ratify treaties, in the Legislative Branch). The necessary and beneficial corollary of that constitutional arrangement is that, in matters of international relations, the nation speaks through a single authoritative voice—the president. That beneficial effect, and the separation of powers principle itself, would be undermined if the Judicial Branch were to presume to enforce treaty provisions on behalf of individuals when its authority to do so is less than clear.[6]

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[6] The concurring judges in *Li* aptly described the "mischief" that could result from allowing individuals to seek redress through the courts when the Executive Branch has not intended or contemplated that result:

> "There is an elaborate regime of practices and institutions by which the United States and other nations enforce commitments *inter sese* or decide that, in the national interest, promises given by or to another sovereign should not be enforced in a specific case. Sometimes this is done purely for reasons of prudence, sometimes for convenience, or sometimes to secure advantage in unrelated matters. Incalculable mischief can be wrought by gratuitously introducing into this often delicate process court enforcement at the instigation of private parties."

In acknowledging the foregoing general rule, we do not mean to say that a court never can read a treaty to create privately enforceable rights. Certainly, the noted presumption can be overcome by explicit wording and even by provisions that necessarily imply a private right of judicial enforcement. For example, courts have allowed individuals judicially to enforce treaties that govern the rights of foreign nationals to inherit property, despite the absence of explicit treaty wording providing for such individual enforcement, most likely because the right-granting wording in those treaties makes sense only if it is read to confer an individually enforceable right. *See, e.g.*, *Clark v. Allen*, 331 US 503, 507-08, 67 S Ct 1431, 91 L Ed 1633 (1947) (dealing with such a treaty). On the other hand, an individual right of judicial enforcement will not be inferred from the mere fact that a treaty sets out substantive rules of conduct that, if honored, would benefit individuals. *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping*, 488 US 428, 442, 109 S Ct 683, 102 L Ed 2d 818 (1989) (holding that Geneva Convention on the High Seas, which provides that illegally boarded merchant ship "shall be compensated for any loss or damage that may have been sustained," does not create private right of action for foreign corporations to recover compensation in United States courts); *United States ex rel Lujan v. Gengler*, 510 F2d 62, 67 (1975), *cert den*, 421 US 1001 (1975) ("[E]ven where a treaty provides certain benefits for nationals of a particular [signatory] state—such as fishing rights—it is traditionally held that 'any rights arising from such provisions are, under international law, those of the [signatory] states and * * * individual rights are only derivative through the [signatory] states.' ") (quoting *Restatement (Second) of the Foreign Relations Law of the United States* § 115, comment e (1965)).

With those considerations in mind, we turn to defendant's proposed interpretation of Article 36 of the VCCR. Although defendant is correct that Article 36 expressly refers to the detained foreign national's "rights" to consular access and notification, the mere use of the term "rights" cannot, by

206 F3d at 68 (Selya and Boudin, JJ., concurring.) Those comments would apply with even more force to the prospect of uneven enforcement in the various state courts.

itself, support an intent to require signatory states to allow individual detainees to enforce those "rights" in a criminal proceeding against them—particularly when the treaty does not specify the nature of the declared "rights" or any remedy that is required for their breach. In fact, it seems likely that the treaty refers to a detainee's "rights" to consular access and notification purely because that is the most convenient and comprehensible way of describing what a receiving signatory state must tell a foreign detainee in order to meet the signatory state's obligations under the treaty. *See U.S. v. Li*, 206 F3d 56, 66 (1st Cir 2000) (Selya and Boudin, JJ., concurring) (making that point).

Neither does any other wording in the treaty suggest an intent to create individual rights that are enforceable in a judicial proceeding. In fact, the purposes stated in the preamble (to "contribute to the development of friendly relations among nations") and in the initial clause of Article 36 ("with a view to facilitating the exercise of consular functions relating to nations of the sending state") both suggest that the treaty and Article 36 are concerned with relationships and obligations among *nations*, not with individual rights.[7]

Finally, there is nothing about the subject matter of the VCCR that would compel an inference that a private right of action was intended. In that regard, we think it is perfectly reasonable to read the treaty as leaving enforcement of Article 36 entirely to the signatory states.

We have described a general presumption that international treaties speak only to the rights and obligations of signatory states and do not confer individual rights that are

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[7] At the same time, we note in passing that we are unimpressed by the state's contention that the Preamble to the VCCR contains a clear *denial* of an intent to create individual rights. The state focuses on the following wording:

> "Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, *[and r]ealizing that the purpose of such privileges and immunities is not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective states."

VCCR, 21 UST at 79 (emphasis added). It is at least arguable that the emphasized clause refers to privileges and immunities of individual consular officials and that, as such, it says nothing about the rights of individual foreign detainees.

enforceable in judicial proceedings. We also have noted that, although Article 36 of the VCCR loosely refers to a foreign detainee's "rights" to consular access and notification, it contains no explicit statement or clear implication of an intent to depart from that general rule. In the absence of any such clear indication to the contrary, we must conclude that the obligations that Article 36 describes are enforceable only by the affected signatory states and not by individual detainees.

That conclusion is confirmed by the fact that, since at least 1970, the State Department has maintained that the VCCR does not create enforceable individual rights and that "the only remedies for failures of consular notification under the [VCCR] are diplomatic, political, or exist *between [signatory] states* under international law." *Li*, 206 F3d at 63-64 (emphasis supplied); *U.S. v. Emuegbunam*, 268 F3d 377, 392 (6th Cir 2001) (citing *Li*).[8] The State Department's interpretation of any international treaty is entitled to substantial weight, because that department of the federal Executive Branch is responsible for negotiating and administering treaties, and also because it generally is the "single authoritative voice" through which the Executive Branch speaks. *Li*, 206 F3d at 67 (Selya and Boudin, JJ., concurring).[9]

We conclude that Article 36 of the VCCR does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding. It follows that defendant's suppression motion in the present case, grounded in the theory that the police had violated his

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[8] It also is confirmed by the fact that, of the one hundred plus nations that have signed the VCCR, none apparently provides an individual remedy through its criminal justice system for violations of the sort that is at issue here. *Emuegbunam*, 268 F3d at 393.

[9] Defendant contends that the State Department's position deserves little weight because it only has taken that position for purposes of litigation. It appears, however, that the State Department's announced position has been consistent since at least 1970. *Emuegbunam*, 268 F3d at 392.

Defendant also contends that the State Department's nonlitigation position is quite different. In so arguing, defendant relies primarily on the fact that various internal State Department documents and publications refer to an arrested foreigner's "right" to consular access without delay. However, as we have noted above, 338 Or at 274-75, the mere use of the term "rights" does not necessarily convey acceptance of an individual right enforceable in judicial proceedings.

rights under Article 36 of the VCCR, was not well taken, and the trial court did not err in denying it.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.[10]

[10] Our legal conclusion in this case is consonant with every other state and federal case of which we are aware that has addressed the issue. *See, e.g., Emuegbunam*, 268 F3d at 390-94; *U.S. v. Jimenez-Nava*, 243 F3d 192, 192, 195-98 (5th Cir 2001), *cert den*, 533 US 962 (2001); *State v. Martinez-Rodriguez*, 131 NM 47, 54, 33 P3d 267, 271-74 (2001), *cert den*, 535 US 937 (2002); *Kasi v. Commonwealth*, 256 Va 407, 419, 508 SE2d 57, 63-64 (1998), *cert den*, 527 US 1038 (1999); *State v. Navarro*, 260 Wis 2d 861, 865-74, 659 NW2d 487, 489-94 (2003), *rev den*, 661 NW2d 101 (2003); *see also Li*, 206 F3d at 66-68 (Selya and Boudin, JJ., concurring). We also note that the Supreme Court of the United States on December 10, 2004, granted *certiorari* in *Medellin v. Dretke*, 371 F3d 270 (5th Cir 2004). That case, which is set for argument on March 28, 2005, involves certain of the issues that we decide today.

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on review, v. MOISES SANCHEZ-LLAMAS, Defendant-Appellant, Petitioner on Review.	))))))))))	Jackson County Circuit Court No. 996212FE SC S51289 CA A114418 ORDER GRANTING MOTION TO STAY ISSUANCE OF THE APPELLATE JUDGMENT

Petitioner on review's motion to stay the issuance of the appellate judgment is granted. The issuance of the appellate judgment is stayed. Upon receipt of notice from petitioner on review that no other thing has been filed requiring a judicial ruling, the appellate judgment will issue immediately. If the United States Supreme Court gives notice that a petition for writ of certiorari has been denied, the appellate judgment will issue forthwith.

Dated this 6th day of April 2005.

WALLACE P. CARSON, JR.
CHIEF JUSTICE

c: Mary Hazel Williams
Susan F. Drake

CONSULADO DE MEXICO

21 September 2001

The Honorable John Minnis and Max Williams
Joint Interim Judiciary Committee
900 Court Street, N.E.
Salem, OR 97301

RE: Vienna Convention on Consular Relations

Good afternoon Chairs Minnis and Williams, members of the committee.

I am Martha Ortiz de Rosas, Consul General of the Consulate of the United Mexican States in Portland, Oregon. The Mexican Consulate was established in 1996 and since then has been earnestly involved in protecting the rights and interests of Mexican nationals. Our efforts in protecting the rights and interests of Mexican nationals are guaranteed through international treaties and international judicial opinions interpreting those treaties, memoranda of understanding between Mexico and the United States, and United States constitutional provisions and federal legislation.

On behalf of the Mexican government I thank you for this opportunity to provide additional information to the people of the state of Oregon on the important issue of consular notification under the Vienna Convention on Consular Relations. We are most interested in assisting in whatever manner we are able to assist Oregon in effectively adhering to the mandatory requirement of advising detained foreign nationals of their right to consular notification and access.

I assure you that as we insist upon adherence to the requirements of the treaty, the United Mexican States also abides by those requirements. We have worked to preserve these rights through talks with the United States, resulting in a Memorandum of Understanding on Consular Protection of United States and Mexican Nationals, dated May 7, 1996. We have also joined others in seeking additional guidance and clarification in the form of a request for an advisory opinion from the Inter-American Human Rights Court, dated June 12, and 13, 1998. Our government has continued its efforts in effecting the rights established under the treaty through the Mexican Federal Court Penal Procedures, chapter II, special rules for the practices of diligences article 128-IV, when the foreigner detained does not

speak or does not sufficiently understands English, a translator will be designated to let them know their rights. The detention will be notified **without delay** to the diplomatic or consular representation that corresponds. In addition, in the enactment of Agreement A/008/2000 of the Attorney General of Mexico City on June 12, 2000, setting out in detail the requirements of the treaty and the procedure to be followed in recognizing those rights, the United Mexican States is committed to timely affording United States citizens detained in Mexico their rights under the treaty.

I trust that the tragic case of Jose Santos Victor Mejia Poot, earlier this year in Portland, is already known to members of this committee. That case, which resulted in Mr. Mejia-Poot's death, demonstrates the need for effective and uniform implementation of Article 36 of the Vienna Convention on Consular Relations. The Consulate was not notified of Mr. Mejia-Poot's detention until after his death. We know of many other cases in which Mexican nationals were not advised of their right to have the Consulate notified of their detention, including cases in which the ultimate and irreversible penalty of death applies. Some of those cases are currently pending in the Oregon courts and we continue to be notified of violations with some frequency.

I assume that this committee has already been provided with copies of the relevant provisions of the Vienna Convention. The relevant portion, for purposes of our discussion today, is Article 36 of that convention. There are several points that I would make concerning the text and meaning of Article 36:

1. Section (b) of Article 36 affords the foreign national individual rights in additional to the national rights afforded the sending nation. This was conclusively determined by the International Court of Justice in *Germany v. United States* on June 26, 2001. This means that both the detained individual as well as the sending nation may seek to enforce the provisions of the treaty and may seek sanctions or remedies for violations of the treaty. We submit this point is important for this committee's consideration as all of the state and federal court decisions of which we are aware had erroneously been based upon an assumption that the treaty's provisions did not establish individual rights.

2. The requirement that law enforcement officials notify a detained foreign national of the right to have their consulate notified is absolute. The treaty's language is not discretionary in this regard – authorities in this state **shall inform** the detained person of his rights to consular notification. With respect to my government, the government of the United Mexican States, the decision as to whether consulate is then notified is left up to the detained individual.

3. Notification of rights is to be done **without delay** when the foreign detainee is in the most vulnerable state leading to involuntary confessions. In fact, the Inter American Court of Human Rights in 1999 interpreted the phrase "without delay",

contained in article 36, as requiring notification no later that the time that the detainee gives his first statement. This is to preserve the detainee rights and allow the intervention of Consular officials.

4. The notification of rights must be made to any foreign national who is detained in any manner. We have observed much discussion concerning the point in time at which notification must be made. Many persons suggest notification be made at the point of arrest or booking into a correctional facility. However, the plain language of the treaty extends beyond arrest or booking -- it speaks explicitly of a foreign national **detained in any other manner**. The case of Mr. Mejia-Poot, who was detained civilly but not arrested, shows us the need for implementation of Article 36 even in cases where there has been no arrest. I note, also, for the committee, that Article 36 is not limited to certain types of detentions. Thus, a foreign national detained civilly as was Mr. Mejia-Poot is entitled to the notification, just as is a foreign national detained in a suspected case of a misdemeanor violation, just as is a foreign national detained in a suspected case of a felony violation. Additionally, I would like to note, for the committee that the rights and protections under article 36 extend not only to the beginning of the detention process, but all the way though that process. That means that consular intervention is ongoing through the detention process.

5. Sections (a) and (c) of Article 36, dealing with consular rights of access and communication with foreign nationals, are intertwined with those rights under section (b), dealing with the notification of rights and consular notification. On June 26, 2001, in *Germany v. United States*, the International Court of Justice explicitly found Article 36 to be an interrelated regime designed to facilitate the implementation of the system of consular protection. We believe the intervention of the Consulate at the time of Mr. Mejia-Poot's detention would have made a difference and would have averted that tragedy.

Our suggestion to this committee is legislation setting out the requirements of Article 36. We suggest a legislative solution due to our experiences with continuing failures of law enforcement to abide by the requirements of Article 36.

Although this committee is much better equipped to evaluate how best to implement the requirements of the treaty within the context of Oregon law, we suggest a detained foreign national be advised of their right to consular notification no later than at the point where Miranda would otherwise required, or, if Miranda is not applicable in a given case, at arrest or civil detention. Implementation at this point, through use of already established points of reference, would seem to more easily and effectively accomplish the implementation of the treaty's rights. We understand Miranda to be a point of reference which brings with it a component of detention, exactly what is described in the treaty. We also understand

Oregon law enforcement officers to already be educated and instructed to recognize this point of reference, thus hopefully making implementation of the treaty's rights smoother.

I understand that, perhaps, this committee may question the advisability of a legislative solution due to questions of liability. I note for the committee, however, that the requirements of the Vienna Convention on Consular Relations are obligatory on Oregon. The question is, I would submit, how Oregon is best to implement those obligatory requirements.

I also understand that, perhaps, this committee may have concerns about the potential collateral consequences to a foreign national upon their admission of their foreign status. I submit that this potential problem is one which can be addressed through careful drafting of the notification to be made to the foreign national. The Consulate has drafted a working proposal of the notification which I would be happy to share with the committee.

I would also like to provide information to this committee on the Consulate's internal protocol upon notification of the detention of a Mexican national. I provide this information so that this committee may better understand how consular notification translates into the protection of foreign nationals' rights. Consular staff speak the language of the detainee, they understand the legal system and they explain the rights to the detainee in a manner that is understandable to the detainee, due to an understanding of the language and culture. These special qualifications are unique to consular staff and cannot be substituted by similar intervention by defense attorneys, social workers, district attorneys or the courts. Failure to notify the detainee of his rights under article 36 can result in the violation of basic rights, such as the right to a fair trail.

Upon notification of the detention of a Mexican national the Consulate will contact the detainee and advise him in his native language of the following:

1. Not to make any statements, whether oral or written, regarding his or her case to anyone and in any setting without having his lawyer or a representative of the Mexican Consulate present;

2. Not to sign any document without having his lawyer or a representative of the Mexican Consulate present, especially if written in English and a Spanish translation is not available;

3. The right to obtain the services of a defense attorney regardless of the detainee's financial situation;

4. If necessary, the Consulate will aid the detained national in finding a competent lawyer;

5. That our Consular office will provide assistance to the indicated defense lawyer in his investigation when collecting information about the detainee's case, family, history in Mexico, witnesses, and other helpful information;

6. That the Mexican Consulate will follow up on the developments of the national's case; and

7. That the detained national has the right to be in continuous communication with the Consulate, including telephonic, written and personal contact.

Immediately following notification of the detention of a Mexican national, by phone or by fax, personnel from the department of Protection will contact the detainee to advise him of his rights as I have described, making effort to ensure that those rights are understood by the detainee. Again, immediate contact with detained Mexican nationals is our highest priority as we seek to effect the preservation and implementation of those citizens' rights as established in this country as well as under international law.

Thank you for the opportunity to appear before this committee and share information as we, together, work in harmony to protect and promote the rights of Mexican nationals and Oregonians alike. I look forward to my tenure here in Oregon and look forward to working with you.

Respectfully yours,

Martha Ortiz de Rosas
Consul General